Case C-41/22

Request for a preliminary ruling

Date lodged:

18 January 2022

Referring court:

Landgericht Erfurt (Germany)

Date of the decision to refer:

13 January 2022

Applicant:

XXX

Defendant:

Helvetia schweizerische Lebensversicherungs-AG

Landgericht Erfurt (Regional Court, Erfurt)

[…]

Order

for reference to the

Court of Justice of the European Union

In the case of

XXX

- applicant -

[…]

v

Helvetia schweizerische Lebensversicherungs-AG[…]

- defendant -

[…]

concerning reversal following cancellation of a life assurance/pension insurance policy

on 13 January 2022, the 8th Civil Chamber of the Regional Court, Erfurt […]

ordered:

I. The proceedings are stayed.

II. The following questions on the interpretation of EU law are referred to the Court of Justice of the European Union pursuant to Article 267 TFEU:

1. Does EU law, in particular Article 15(1) of the Second Life Assurance Directive, Article 31 of the Third Life Assurance Directive and Article 35(1) of Directive 2002/83/EC, read where appropriate in the light of Article 38 of the Charter of Fundamental Rights of the European Union, preclude national legislation or case-law under which a policyholder – who has legitimately exercised his or her right of cancellation – is required to bear the burden of demonstration and proof for the purpose of quantifying the benefits of use derived by the insurer itself? Where such an imposition of the burden of demonstration and proof is permissible, does EU law, especially the principle of effectiveness, require that the policyholder enjoy, in return, rights to information or some other assistance from the insurer that will enable him or her to enforce his or her rights?

2. Is an insurer which provided the policyholder with no information or only incorrect information on his or her right of cancellation prohibited from relying on forfeiture, abuse of rights or lapse of time to prevent the exercise of the policyholder's resultant rights, including the right of cancellation?

3. Is an insurer which provided the policyholder with no consumer information or only incomplete or incorrect consumer information prohibited from relying on forfeiture, abuse of rights or lapse of time to prevent the exercise of the policyholder's resultant rights, including the right of cancellation?

A. Facts and subject matter of the main proceedings

The parties (the policyholder and the insurer) are in dispute over the complete reversal of an insurance contract entered into under the 'application model'.

The applicant concluded a unit-linked pension policy with the defendant insurance company in 2008. The consumer information was sent to him together with the application. The details are disputed.

The applicant cancelled the policy in 2020 pursuant to Paragraph 8 of the old version of the Gesetz über den Versicherungsvertrag (Law on Insurance Contracts, 'the VVG'). He argues that the information on the right of cancellation failed to fulfil the formal and substantive requirements. In addition, he bases his cancellation on the fact that essential consumer information was missing or was incomplete.

The applicant is, in essence, seeking reimbursement of the premiums paid in the interim and of the benefits of use which the insurer derived from the premiums and used in its business on the grounds of unjust enrichment. In order to calculate the compensation for benefits of use, the applicant has requested detailed information from the defendant, for example on the allocation of the premiums paid by him to individual items such as administrative costs, contracting costs, risk costs or savings, or on the precise use of the premiums.

The defendant insurance company contends that information on the right of cancellation was provided in due form and that all the essential consumer information was sent, and it rejects all the rights to information claimed by the applicant. Moreover, the insurance company is relying on forfeiture or abuse of rights within the meaning of Paragraph 242 of the Bürgerliches Gesetzbuch (Civil Code, 'the BGB'). It contends that the contract was performed without complaint over a period of 12 years, that legal certainty must be restored after no more than 10 years, and that German law provides for a period of 10 years even in the case of a challenge on the grounds of fraudulent misrepresentation, irrespective of any knowledge of the facts.

The parties are in dispute as to whether the current case-law of the Court of Justice of the European Union on forfeiture and abuse of rights in connection with withdrawal from a consumer loan is applicable to insurance law.

B. Legal context

The provisions of German law which applied when the contract was concluded and which are of relevance for the purpose of adjudicating the dispute read as follows:

Paragraph 8 of the old version of the VVG

(1) The policyholder may revoke his contractual agreement within 14 days. The policyholder shall declare his revocation to the insurer in writing, but need not state any reason; timely dispatch shall suffice for compliance with the time limit.

(2) The revocation period shall begin at such time as the policyholder receives the following documents in writing:

1. the insurance policy and the terms of contract, including the general terms and conditions of insurance, as well as the other information in accordance with Paragraph 7(1) and (2), and

2. a clearly worded instruction regarding the right of revocation and the legal consequences of the revocation which makes clear to the policyholder his rights commensurate with the requirements of the means of communication employed, and the name and address of the person to whom the revocation is to be declared, as well as a note making reference to the commencement of the revocation period and to the rules set out in subparagraph (1), second sentence.

The notification meets the requirements of point 2 of the first sentence if the model published by the Federal Ministry of Justice on the basis of a statutory instrument pursuant to subparagraph 5 is used. Proof of receipt of the documents in accordance with the first sentence shall be incumbent on the insurer.

Paragraph 242 of the BGB Performance in good faith

An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration.

C. Relevance to the judgment and background of the questions referred

This order for reference revolves around whether and to what extent national law or case-law – 'Law in Books and Law in Action' – may hinder or frustrate the exercise and enforcement of the policyholder's rights, or whether the policyholder has rights to information or some other assistance from the insurer when enforcing those rights. In particular, it is necessary to clarify if there are any limits on the exercise of consumer rights in insurance law. Can an insurance company rely on forfeiture, abuse of rights or lapse of time where the information on the right of cancellation was incomplete or the necessary consumer information was missing?

The more specific questions disputed between the parties, as to whether the information on the right of cancellation met the formal and substantive requirements or whether all the necessary consumer information was provided, are not referred to the Court. After all, it is not a problem of interpretation that is the main issue; it is the simple application of the law required of the national courts, as courts of the European Union. The Court of Justice of the European Union and the Bundesgerichtshof (Federal Court of Justice) have already developed significant case-law in that regard; therefore, those questions can be resolved through the judicial system (see, for example, judgment of 19 December 2019, C-355/18 to C-357/18 and C-479/18, EU:C:2019:1123; see also the comprehensive Opinion of Advocate General Bobek of 2 September 2021, C-143/20 and C-213/20, EU:C:2021:687).

1. The first question referred

The first relevant question that arises is whether a consumer bears a **burden of demonstration and proof** in order to enforce a legitimate claim through the courts to reversal of an insurance contract which never took effect and, if so, what that burden is. Does the consumer have any **right to information** from the insurer concerning the benefits of use derived in fact by the insurer from the premiums paid?

a) The rules governing life assurance have not been fully harmonised. It is therefore for the Member States to determine the scope and limits of the policyholder's claims following successful cancellation. In so doing, they must abide by the principles of equivalence and effectiveness.

Under German law, the policyholder is entitled to the premiums already paid, less a small risk element, and compensation for benefits of use. Thus, the insurer, which has used the policyholder's money in its business, must pay out the return.

This is permissible under EU law, but not following withdrawal from loan agreements, which are fully harmonised and do not provide for compensation for benefits of use (see, in that regard, judgment of 4 June 2020, C-301/18, EU:C:2020:427).

A fair and reasonable balance has to be struck between the legitimate interests of policyholders, the concerns of insured persons and the legitimate interests of insurers and the insurance industry. The issue under scrutiny is whether that has been achieved in Germany with regard to compensation for benefits of use.

b) According to the settled and unbroken case-law of the Federal Court of Justice, the policyholder bears the burden of demonstration and proof in order to claim the benefits of use derived in fact by the insurance company from his or her premiums. That means that the policyholder must conclusively demonstrate and, if necessary, prove the accrual and amount of the benefits of use derived in fact. In doing so, he or she must refer to the actual cash flow of the defendant insurer (in summary, Federal Court of Justice judgment of 29 April 2020 – IV ZR 5/19, DE:BGH:2020:290420UIVZR5.19.0, paragraph 16).

Over the years, the Federal Court of Justice has rejected several formulae, as well as methods used by complainant consumers, to establish independently the compensation for benefits of use.

The criteria established in German case-law require the policyholder to carry out extensive research and to provide a comprehensive presentation of the facts. In fact, the consumer has to establish the insurer's cash flow and, for example, fund profits and the performance of a fund from its communications or from publicly accessible sources, such as the insurer's published annual reports, and then base his claim on these (see Federal Court of Justice judgment of 11 November 2015, IV ZR 513/14, paragraph 50; Thüringer Oberlandesgericht (Higher Regional

Court, Thuringia) judgment of 31 July 2020, 4 U 1245/19, paragraph 67 et seq.). Obviously, this is often too much to expect of policyholders, and presumably that is why they do not assert their rights.

Therefore, there is serious doubt as to whether this legal practice is compatible with the principle of effectiveness (see, with regard to the burden of proof in connection with unfair terms, judgment of 10 June 2021, C-776/19 to C-782/19, EU:C:2021:470). If the burden of demonstration and proof of benefits of use is imposed on the policyholder, it is liable to make it excessively difficult for the policyholder to exercise the rights conferred under consumer protection directives, including on life assurance.

However, where the consumer or beneficiary in general under EU law is lacking evidence, because it is difficult or impossible to access the relevant information, the burden of proof is lightened or even reversed in application of the principle of effectiveness in EU law (see also judgment of 4 June 2015, C-497/13, EU:C:2015:357). The usual mechanisms of civil procedural law, based on formal parity between the parties and the principle of *actori incumbit probatio*, do not suffice in the present case to ensure the effective and successful enforcement of consumer claims. Lastly, it is important to acknowledge that, in cancelling the policy, the consumer is exercising a right that presupposes breach on the part of the insurer. Therefore, the idea of penalties might also be of importance.

c) If the consumer bears the burden of demonstration and proof nonetheless, does he or she then have in return rights to information or some other form of assistance from the insurer?

The general tenet under EU law is that evidence must be disclosed by the other party. This applies, for example, under antitrust law or intellectual property law (see also Article 18 of Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers).

It might follow from Article 31(1) of the Third Life Assurance Directive and the Annex thereto that the policyholder has a right to information from the insurer. Advocate General Sharpston stated in the case of a life assurance policy with an investment component, where the amount of the insurance benefit depends on how the insurer uses the premiums, that the insurer is required to provide the policyholder with information on the purposes for which the premiums are used, by reference to absolute amounts or percentages, prior to the conclusion of the contract and, in the event of any change thereto, during the term of the contract, so that the policyholder can make a more informed decision, and that, at the very least, the relevant criteria must be explained to him or her (Opinion of 12 April 2014, C-51/13, EU:C:2014:1921).

If the insurer is required prior to the conclusion of the contract to explain (where possible) exactly how premium payments are used, by reference to absolute amounts or percentages, then it might be required *a fortiori* after the conclusion of

the contract to explain exactly how the premiums were used, if benefits of use were derived from the premiums, in order to enable the complete reversal of the insurance contract.

2. The second and third questions referred

Where a right of cancellation exists because the information was missing or was incorrect or consumer information required under EU law was missing, insurers and courts in Germany frequently rely on **forfeiture and abuse of rights** to refuse reversal or claims for damages on the grounds of incorrect information [reference to literature].

The Federal Court of Justice considers, even where information on the right of cancellation is missing or, more often, where the information is incorrect, that the right of cancellation is inadmissible where the circumstances of the specific case are particularly serious (see the recent Federal Court of Justice order of 8 September 2021, IV ZR 133/20, DE:BGH:2021:080921BIVZR133.20.0, paragraph 17; see also Federal Court of Justice judgment of 10 February 2021, IV ZR 32/20, DE:BGH:2021:100221UIVZR32.20.0, paragraphs 17 and 18). The same applies where consumer information is missing or is incorrect. However, the lower courts take a very generous approach to such exceptions.

The Federal Court of Justice clearly considers that it suffices if the policyholder's conduct is objectively inconsistent: The policyholder allows the period granted and notified for exercising the right of cancellation to expire without exercising that right at the time when the contract is concluded and regularly pays the agreed insurance premiums. The policyholder contradicts that conduct, pursued over a long period of time in his or her own interest, if he or she later claims that a contract never existed and demands repayment of the premiums from the insurance company, which will have quite reasonably relied on the existence of the contract. In any event, neither dishonest intentions nor fault on the part of the policyholder are required in order to invoke the plea of abuse of rights. The conduct of the person who holds the right need only have given rise to what is to him or her a recognisable legitimate expectation on the part of the other side of a particular situation in fact or in law.

However, that recourse by the Federal Court of Justice to the topos of good faith (Paragraph 242 of the BGB) would appear to be problematic in the light of mandatory and overriding EU law and the relevant case-law of the Court […] [reference to literature].

According to that law, a plea of abuse of rights is subject to narrow limits and requires special justification. The Court has consistently held in its case-law that, as a rule, a subjective element must also be present in order to substantiate abuse of rights (see, with regard to limitation, judgment of 10 June 2021, C-776/19 to C-782/19, EU:C:2021:470, paragraph 46; see also judgment of 19 December 2019, C-355/18 to C-357/18 and C-479/18, EU:C:2019:1123, paragraph 69 et

seq.; see also judgment of 19 December 2013, C-209/12, EU:C:2013:864, paragraph 27).

Consequently, the consumer must know his or her rights, which the consumer did not in this case. In the interests of consumer protection, limitation of consumer rights is not possible (see judgment of 9 September 2021, C-33/20, C-155/20 and C-187/20, EU:C:2021:736).

That consumer-friendly position is also supported by Article 38 of the Charter of Fundamental Rights which, at the very least, has an advance effect here. Article 38 of the Charter of Fundamental Rights adopts the principle that EU policies shall ensure a high level of consumer protection. That goes hand in hand with the need for optimisation. The scope of the Charter of Fundamental Rights, as supreme law of the land and living instrument, applies in the present case, i.e. it is binding and gives rise to an obligation on the part of the European Union and its Member States (Article 51(1) of the Charter of Fundamental Rights). The applicability of European Union law (in this case the insurance law determined for the entire Union) entails and imposes applicability of the fundamental rights guaranteed by the Charter (judgment of 26 February 2013, C-617/10, EU:C:2013:105, paragraph 21).

Moreover, it should be possible to apply the basic findings in the Court's current case-law on forfeiture and abuse of rights in connection with withdrawal from consumer loans to insurance law (see, with regard to the details, judgment of 9 September 2021, C-33/20, C-155/20 and C-187/20, EU:C:2021:736).

The Court has ruled that a lender is prohibited from invoking a plea of forfeiture to prevent a consumer from exercising his or her right of withdrawal where mandatory information was neither included in the credit agreement nor subsequently communicated in due form, irrespective of whether the consumer knew of his or her right of withdrawal and without their bearing any blame for ignorance. The same applies to the plea of abuse of rights.

There does not appear to be any cogent reason why that case-law should not also apply in insurance law.

Finally, the court refers to the similar order for reference made by the Regional Court, Erfurt, on 30 December 2021 ([…] C-2/22) concerning the policy model and the question of forfeiture and abuse of rights.

[…]